Supreme Court, U.S.
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No. 05-1663

IN THE
Supreme Court of the United States

TIMOTHY KUZMA and NANCY KUZMA,

Petitioners,

v.

THE CITY OF FORT MYERS,
a Florida municipal corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Florida law requires compensation for taken property to be no less than the lowest value supported by evidence. Evidence showed that the Kuzmas' run-down, obsolete motel buildings were ten years past their useful lifespan and diminished the value of the property as a whole. Have the Petitioners shown that the Court of Appeals failed to apply substantive Florida law when it upheld the jury's verdict that the buildings had no value by the time they were demolished?

II. Because the jury found that the buildings had no value, neither the District Court nor the Court of Appeals ruled on whether the City's demolition of the motel was a taking. The Petitioners claim that Florida law required both courts to have found a taking *per se*. Have the Petitioners presented compelling reasons to grant the Petition, when their argument, which they did not raise below, is contrary to Florida law and the law of this Court?

III. Florida law provides the right to have a 12-member jury determine compensation in condemnation cases. After validly waiving that right, the Kuzmas tried unsuccessfully to reassert it after the venire had already been assembled. Have the Petitioners shown compelling reasons to grant the Petition, when this purely-state-law issue does not present a conflict with a decision of any Florida court?

IV. The jury was instructed that the City acted unreasonably in closing the motel, and was asked to determine if the closure caused the Kuzmas to lose their equity in the property. Have the Petitioners presented compelling reasons to grant the Petition, when the instruction raises no conflict with a decision of the Court or a Court of Appeals, and the Petitioners do not claim that it implicates an important federal question that has not been settled by the Court?

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STATEMENT OF THE CASE

The City of Fort Myers closed and demolished the dilapidated, 50-year-old Edisonian Court Motel after determining that the motel's buildings were unsafe and a threat to public health, safety and welfare. The motel's owners, Nancy and Timothy Kuzma, did not challenge the City's determination that the motel was unsafe or try to stop the demolition through the City's administrative appeal process. Instead, the Kuzmas sued the City after the motel had been torn down.

The First Trial

In November, 2002, the case went to trial for the first time. There were four issues to be determined: 1) whether the City violated the Kuzmas' right to procedural due process when it closed the motel; 2) whether the closure was an unreasonable seizure in violation of the Fourth Amendment; 3) whether the City's eventual demolition of the motel was an unreasonable seizure in violation of the Fourth Amendment; and 4) on a pendent state claim for inverse condemnation, the amount of just compensation the City should pay to the Kuzmas if the trial court determined that the demolition of the motel buildings was a taking.

At the pre-trial conference, counsel for the Kuzmas requested a seven-member jury, rather than the 12-member jury that condemnation claimants are entitled to under Florida law. The City agreed. In accordance with the parties' agreement, the trial court empaneled a jury of seven.

After hearing all the evidence, the jury determined that the City's closure of the motel was an unreasonable seizure,

but resolved all of the Kuzmas' other claims in favor of the City. As to damages, the jury found that the City had not caused the Kuzmas any emotional pain or mental anguish, and awarded $40,000.00 in "nominal" damages, which the trial court reduced to $1.00. The trial court granted judgment as a matter of law in the City's favor on the inverse condemnation claim, after excluding the Kuzmas' valuation expert and an interrogatory answer by the City regarding valuation. The trial court also ruled as a matter of law that the Kuzmas were not entitled to economic damages, because they had not shown that the City's closure of the motel proximately caused their loss of the property through foreclosure some ten months later.

The Kuzmas appealed the judgment to the Eleventh Circuit. In an unpublished opinion entered on June 7, 2004, the Eleventh Circuit reversed the trial court's exclusion of the Kuzmas' valuation evidence and the two judgments as a matter of law, and remanded for a second trial on economic damages and the inverse condemnation claim.

The Second Trial

On October 26, 2004, the second trial began. Following the Eleventh Circuit's mandate, there were three factual issues to be resolved: 1) whether the Kuzmas had equity in the motel when the City closed it; 2) whether the City's closure of the motel caused the Kuzmas to lose their equity, if any; and 3) the amount of just compensation for the demolished motel buildings, if the trial court were to find that the City's demolition amounted to a taking. Once again, the trial court prepared to convene a seven-member jury.

Before the venire entered the courtroom, counsel for the Kuzmas engaged the court in a protracted argument relating to jury instructions. Although the trial court repeatedly assured counsel that his objections would be addressed at the charge conference, argument continued. Then, for the first time, counsel for the Kuzmas demanded that twelve jurors be seated, rather than the seven to which the parties had previously stipulated. Counsel for the City objected to this last-minute change as being prejudicial to the City, and the trial court agreed. A seven-member jury was empaneled.

During this second trial, the jury heard testimony from the Kuzmas' valuation expert, Melissa Creasy; the City's expert appraiser Woodward Hanson; Nancy Kuzma; and the president of the bank that had held three mortgages cross-collateralized by the motel property. The testimony fell into three main categories: lay and expert opinion as to the value of the motel buildings and the land underlying the motel; the Kuzmas' financial condition; and the amount of liens encumbering the motel at the time it was closed.

For the Kuzmas, Ms. Creasy testified that she used the sales comparison approach alone to arrive at a total value of $791,900 for the motel property, of which $540,700 represented land value and $251,200 represented the value of the improvements. Her analysis did not consider the motel's income, even though she conceded on cross-examination that a buyer wanting to continue operating the motel would base his purchase decision on that information. She also conceded that someone buying the property would most likely demolish the buildings and put the property to a different use, and that for such a purchaser, the existing improvements would adversely affect the value of the property as a whole. Additionally, Ms. Creasy acknowledged

that the motel was ten years past the 40-year life expectancy for its class of buildings, as established by the Marshall Valuation Service, which she considered authoritative.

The Kuzmas also put on as valuation evidence the City's interrogatory answer 26, which had been excluded in the first trial. The interrogatory answer reflected the Lee County Property Appraiser's valuation of the motel structures at $72,240.00 for ad valorem tax purposes.

For the City, Mr. Hanson testified that he used both the sales comparison approach and the income capitalization approach to arrive at an overall value for the motel property of $550,000, of which $510,000 was land value, and $40,000 was the value of the motel as a going concern.[1] Like Ms. Creasy, he also testified that the motel was at the end of its useful life, and that the property would be more valuable to a buyer without the improvements, as the site for a more intensive commercial use such as a convenience store.

Mrs. Kuzma's testimony tended to bear this out. In 1994, the Kuzmas put the motel on the market after years of steadily-declining tourist business, and ultimately switched to weekly rentals with low rates and minimal services. Their prime motivation was to get out of the crime-ridden area in which the motel was located, and start new restaurant businesses in nearby suburban Cape Coral. After six years on the market, the motel attracted only two written offers, both of which required tearing down the existing buildings to make way for more intensive uses.

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1. The Kuzmas' attorney, however, had stated earlier on the record in the jury's presence that the business value of the motel was not to be considered when valuing the bricks and mortar.

The only actual contract to purchase the property was from 7-Eleven, and it was contingent on the City installing a traffic signal at the intersection where the motel property was located. In 1999, Mrs. Kuzma wrote to the then-mayor of Fort Myers imploring him get the signal installed, and to "have the code inspector leave us alone until we can get the land sold and the motel torn down." She told the mayor that the motel was not a viable business, that it had not made a profit in years, and that if the signal was installed, "everybody wins. We get to tear down the building and get our equity out of the land."

Mrs. Kuzma also testified with regard to the liens encumbering the property and the Kuzmas' financial condition prior to the closure of the motel. Despite being unable to sell the motel, the Kuzmas had moved forward with their plans to start new businesses in Cape Coral. In 1997, the Kuzmas borrowed $75,000 from Cape Coral National Bank to purchase a TCBY franchise, and formed Kuzma Properties, Inc. to operate both the motel and the new franchise.[2] The following-year, the Kuzmas borrowed $315,000 more from CCNB to buy a building in Cape Coral to house the TCBY, and another $32,000 to partially pay for a new Arthur Treacher's franchise. The three mortgages were all secured by the motel property, as well as by the building in Cape Coral. The rest of the money for the second franchise came from second and third mortgages on the Kuzmas' home, and a $29,000 loan from Mr. Kuzma's mother. From 1997 on, Kuzma Properties, Inc. reported ever-increasing losses to the IRS, as did the Kuzmas on their personal tax returns. Mrs. Kuzma testified that "every penny" of the income from the motel was being put into the new businesses.

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2. The corporation was not a party to this lawsuit.

By November, 2000, a month before the City closed the motel, the Kuzmas' financial picture was grim. CCNB had to "force place" insurance on the mortgaged properties because the Kuzmas had not paid the premiums. The Kuzmas had defaulted on the $315,000 CCNB mortgage, and were not making full payments to the holder of the first mortgage on the motel. The motel had accumulated $42,640.91 in unpaid property tax liens. The December 2000 bank statement for Kuzma Properties, Inc. showed that the corporation had a total of $233.00 in available operating funds. As described by the trial court in its order resolving the parties' post-trial motions, "[t]he totality of circumstances . . . suggest that by December 2000 [before the City closed the motel] the Kuzmas were in dire financial trouble." (Petitioners' App. at 8, pp. 4-5).

After the motel was demolished, first CCNB and then the first mortgage holder for the motel property, Frank Camposano, sued to foreclose. CCNB's president testified that the bank obtained the Cape Coral restaurant property at its foreclosure sale in October, 2001, but did not pursue any deficiency in the Camposano foreclosure action. Mr. Camposano obtained the land on which the motel had stood at his foreclosure sale the following month.

At the close of the evidence, the trial court instructed the jury that the Kuzmas had brought two claims: first, that they had suffered economic damages in the form of lost equity because the City unreasonably closed the motel; and second, that they were entitled to just compensation from the City for demolishing the motel buildings. The jury was instructed to calculate the equity the Kuzmas had in the motel property at the time of the closure by determining the fair market value of the land and the improvements, less the encumbrances,

and then to determine whether the Kuzmas had lost their equity, if any, as a result of the City's unreasonable closure of the motel. The jury was instructed further to find the amount of just compensation, as measured by the value of the improvements on the day they were demolished, that the City should pay to the Kuzmas if the court found that a taking had occurred.

After closing arguments, the jury retired and returned the following verdict:

> We, the jury find the following from a preponderance of the evidence:
>
> **Plaintiffs' Loss of Equity, if Any, Attributable to Closure of the Motel.**
>
> 1. What amount of equity, if any, did the Plaintiffs have in the property as of December 6, 2000? (Fill in each line of the calculation below)
>
> a) Fair market value of the property composed of:
>
> | | |
> |---|---|
> | Land: | $ 510,000 |
> | Motel structures: | $ 72,000 |
> | Total | $ 582,000 |
>
> b) Amount of encumbrances (for example: mortgages, liens, accrued taxes, etc.):
>
> | | |
> |---|---|
> | Total | $ 555,000 |

c) Amount of equity (that is: total fair market value of the property minus total amount of encumbrances):

Amount $ 27,000

2. Did the Plaintiffs lose equity in the property through mortgage foreclosure?

Answer: ____ Yes __X__ No

3. Was the mortgage foreclosure proximately caused by the motel being closed by the Defendant?

Answer: ____ Yes __X__ No

Amount that Would Constitute "Full Compensation" for the Motel, itself.

1. What amount, if any, would constitute "full compensation" for the value of the motel structures at the time of demolition?

Amount: $ 0

SO SAY WE ALL.

Norman Kay

Foreperson

DATED: 10/28/2004

The jury was polled and confirmed that the verdict was unanimous, and they were excused without objection from counsel.

Counsel for the Kuzmas then made several oral motions for a new trial, asserting, among other grounds, that the jury's failure to ascribe value to the motel improvements as of the date they were demolished, after finding that at the time of the closure the improvements had some value, was inconsistent and contrary to the evidence. The Kuzmas did not, however, argue that the verdict was contrary to Florida law. Written motions were submitted, were opposed by the City, and were denied by the trial court. (Petitioners' App. at 8). The trial court declined to rule on whether a taking had occurred, the zero-value verdict having rendered the issue moot. (Petitioners' App. at 8, pp. 37-38 n.14). Judgment was entered in favor of the City. (Petitioners' App. at 7). Another appeal to the Eleventh Circuit ensued.

The Kuzmas raised five issues on appeal: 1) whether the jury's zero verdict on just compensation was contrary to the evidence and to Florida law; 2) whether the Kuzmas were entitled to a 12-member jury under Florida law; 3) whether Florida law required them to exhaust administrative remedies before bringing an inverse condemnation claim; 4) whether the jury instructions on causation and damages for the § 1983 claim were defective; and 5) whether the trial court erred in admitting certain exhibits into evidence. The Kuzmas did not raise the issue of whether the trial court had erred by failing to find a taking *per se*. In an unpublished opinion entered on October 3, 2005, the Eleventh Circuit affirmed the trial court in all respects. (Petitioners' App. at 1).

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court, any Court of Appeals, or any Florida court. Nor do they implicate a federal question that has not been decided by this Court. Accordingly, the Petitioners have not carried their burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10. The Petition should be denied.

I. The Eleventh Circuit Did Not Disregard Applicable, Substantive Florida Law When it Upheld the Jury's Finding That the Motel Buildings Had No Value by the Time the City Demolished Them.

The Petitioners contend that the District Court departed from the *Erie* doctrine by "refusing to instruct" the jury to award no less compensation "than the amount testified to by the City or its expert[.]" The Petitioners' argument is without merit for two reasons. First, the Petitioners have waived this argument by not raising it below. Second, even if they had not waived it, the jury's zero-value verdict was supported by the evidence, and thus comports with Florida law.

A. The Petitioners Never Challenged the Jury Instruction on Awarding Compensation for the Demolished Motel Buildings.

The trial court used the instruction on just compensation that the parties had agreed to at the charge conference, which was:

> For the Kuzmas' second claim, the Court will determine as a matter of law whether the City is

> liable under the Florida Constitution to compensate the Kuzmas for a taking of the motel structures and improvements. Your job is to determine the value of the motel structures and improvements by themselves and not the underlying land. If the Court determines that the City engaged in a taking of the motel structures and improvements by reason of the demolition, and thus that the City is liable to compensate the Kuzmas for those structures and improvements, the Court will then award to the Kuzmas the value, if any, of the motel structures and improvements in the amount that you determine.

Until their Petition, the Kuzmas had never complained about this instruction. After the zero-value verdict was rendered, the Kuzmas argued that it was inconsistent and contrary to the evidence, but not that the jury instruction was defective. On appeal, they still did not challenge the jury instruction, arguing instead that the verdict was against the evidence and insufficient as a matter of law. Since the propriety of the instruction on just compensation was not an issue raised below or passed upon by either lower court, it is not properly presented as a basis for this Court's review. The Supreme Court cannot decide issues raised for the first time in a certiorari petition. *See Tacon v. Arizona*, 410 U.S. 351, 352 (1973).

B. The Jury's Zero-Value Verdict Was Supported By the Evidence.

Even if the Kuzmas had raised the instruction-on-compensation issue below, it would still present no basis for the Court's review. As both lower courts found, the verdict was supported by the evidence, thus comporting with Florida

law. Moreover, these entirely fact-based rulings do not, by themselves, justify the exercise of this Court's certiorari jurisdiction, even if the lower courts arrived at their decisions by misapplying Florida law. *Id.*

Florida law requires juries in compensation cases to award no more and no less compensation than is supported by the evidence. *See Garvin v. State Road Dept.*, 149 So. 2d 869 (Fla. Dist. Ct. App. 1963). The Petitioners contend that the lowest value supported by the evidence was $40,000. As both the trial court and the Court of Appeals pointed out, however, this is not correct. (Petitioners' App. at 1, pp. 4-6; App. at 8, pp. 35-36).

The City's appraiser, Mr. Hanson, testified that the buildings were worth $40,000 "as a going concern," but the Kuzmas' counsel asserted that business value was not to be considered. Both appraisers testified that the motel buildings were ten years beyond their useful life and detracted from the value of the property as a whole. Mrs. Kuzma's testimony supported a finding that even when the motel was still operating, all of the value was in the land, and that the improvements were an impediment to selling the property. Although the jury did find that the buildings were worth $72,000 on the day the City closed the motel, they could have reasonably found that the buildings, no longer "a going concern," lost whatever value they had in the four months that elapsed between the closure and the demolition.

The Petitioners do not suggest that either the trial court or the Court of Appeals applied the wrong standard of review in upholding the verdict. *See King v. Exxon Co.*, 618 F.2d 1111, 1116 (5th Cir. 1980) (requiring the verdict to be upheld unless all of the evidence, viewed in the light most favorable

to the nonmoving party, cannot support it). And since the verdict was supported by the evidence, upholding it comports with Florida law. *See Garvin*, 149 So. 2d 869; *Castillo v. E.I. Du Pont De Nemours & Co., Inc.*, 854 So. 2d 1264, 1277 (Fla. 2003) (reiterating that the verdict must be sustained if there is any competent evidence to support it.) Accordingly, the jury's verdict presents no issue for this Court's review.

II. The Eleventh Circuit Did Not Disregard Applicable, Substantive Florida Law by Agreeing with the Trial Court That the Zero-Value Verdict Made the Kuzmas' Inverse Condemnation Claim Moot.

There is no merit to the Petitioners' argument, which they did not make below, that Florida law required the lower courts to find that the City's demolition of the motel buildings was a taking *per se*. Like the instruction-on-compensation issue, the question is improperly presented because it was not raised below or passed upon by the Court of Appeals.

The Kuzmas' argument to the Eleventh Circuit only addressed the District Court's footnoted comment that even if the inverse condemnation claim had not been mooted by the verdict, it appeared to be invalid because the Kuzmas continued to challenge the propriety of the City's actions in demolishing the motel. (Petitioners' App. at 8, pp. 37-38 n.14). *See Janson v. City of St. Augustine*, 468 So. 2d 329, 330 (Fla. Dist. Ct. App. 1985) (holding that an inverse condemnation claim will not lie when the claimant is challenging the substantive validity of the governmental act). The Kuzmas interpreted this as a "ruling" by the District Court that they had failed to exhaust administrative remedies, and challenged it on that basis alone. The "*per-se*-taking" argument appeared for the first time in the Petition, and is therefore not properly before the Court. *See Tacon*, 410 U.S. at 352.

Additionally, this argument is without merit is because it is contrary to the law of Florida and of this Court. The Court has *not* held that the government's uncompensated destruction of private property is a taking *per se*, but rather that it is justified when reasonably necessary to protect public health, safety and welfare. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488, 491-92 (1987). The Florida Supreme Court has held similarly. *See Thomas v. City of West Palm Beach*, 299 So. 2d 11 (Fla. 1974). The *per-se*-taking cases cited by Petitioners do not involve buildings demolished for public safety concerns, but rather the invalidity of statutes authorizing private cable companies to install equipment on apartment buildings without permission from, or compensation to, the owners of the buildings. *See Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Assoc., Ltd.*, 493 So. 2d 417 (Fla. 1986); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). These cases do not apply to the case at hand, where the City, pursuant to its police power, demolished the motel buildings because they were found to be unsafe, a determination that the Kuzmas chose not to appeal.

Accordingly, even if the Petitioners had raised the argument below, it is meritless, and cannot serve as a basis for invoking the Court's certiorari jurisdiction.

III. The Eleventh Circuit Did Not Disregard Applicable, Substantive Florida Law When it Determined that the Kuzmas Had Waived Their Right to a 12-Person Jury.

The Petitioners have presented no reason, compelling or otherwise, for this Court to review whether they were denied their purely state-law right to a 12-member jury. The Kuzmas validly waived that right before the first trial, by

requesting a jury of seven. *See Division of Admin. State of Florida Dept. of Transp. v. Davis*, 511 So. 2d 686, 688 (Fla. Dist. Ct. App. 1987) (holding that the right to a 12-person jury may be validly waived by oral stipulation in open court). At no time before the opening day of the second trial did the Kuzmas retract that waiver, or even hint to the City or to the trial court that the jury for the second trial should consist of twelve persons instead of seven.

The demand for a 12-person jury was not made until the first day of the second trial, after the court had called a venire only large enough to produce a seven-person jury. In light of the Kuzmas' valid waiver, the trial court properly rejected the demand. The Court of Appeals, reviewing the issue *de novo*, affirmed. Nothing about either of the lower courts' rulings presents an appropriate basis for this Court's review.

IV. The Petitioners Have Presented No Compelling Reason for the Court to Review the Jury Instructions on § 1983 Damages and Causation Given in the Second Trial. The Instructions Accurately Reflect the Law and Present No Conflict With a Decision of the Court or any Court of Appeals.

The Petitioners have not cited a single case showing that the Eleventh Circuit's ruling on the § 1983 jury instructions presents a conflict with any other court. Nor have the Petitioners asserted that their dissatisfaction with the instructions implicates a federal question that has not been settled by this Court. The Petitioners have not presented the Court with any basis to review the Eleventh Circuit's entirely appropriate ruling, and the Petition should be denied.

The Petitioners contend that the jury could not "fashion a remedy," because the trial court did not expressly instruct them that the City had violated the Kuzmas' constitutional rights by closing the motel. The Petitioners conclude that as a result of improper instruction, the jury became confused, denying the Kuzmas a fair trial.

Jury instructions will survive review even if technically imperfect, as long as they accurately reflect the law. *See Eskra v. Provident Life and Acc. Ins. Co.*, 125 F.3d 1406, 1415 (11th Cir. 1997). The challenged instructions are as follows:

> Now, in a prior proceeding, it was determined that the City unreasonably caused the closure of the motel in December of 2000. So for the Kuzmas' first claim, the issues for your determination are whether the Kuzmas suffered any economic damage in the form of lost equity as a result of that closure and whether the City's closure of the motel was the proximate cause of the property's ultimate foreclosure.
>
> * * *
>
> Now, with respect to the equity issue, there's also an element of causation that you need to determine. You must determine whether the Kuzmas have proven by a preponderance of evidence that the City's closure of the motel caused the Kuzmas to lose equity in the property.
>
> "Cause" refers to the element of legal responsibility. A person is responsible for the natural consequences of his or her actions. For loss or damage to be caused by a defendant's conduct, it must be shown that

> except for that conduct such loss would not have occurred; and it must also be shown that the loss was the reasonably foreseeable consequence of the defendant's conduct.
>
> If you find that the Kuzmas' loss of equity was not reasonably foreseeable or if you find that the Kuzmas would have lost the property to mortgage foreclosure even if the City had not closed the motel, then you have found that the City did not cause the Kuzmas' loss.
>
> If you find that the Kuzmas' loss of equity was reasonably foreseeable and that had the City not closed the motel, the mortgage on the property would not have been foreclosed, then you have found that the City caused the Kuzmas' loss.

As these instructions show, the trial court explained to the jury that the closure of the motel was unreasonable, as determined by the jury in the first trial. The trial court also explained the basis for awarding damages for a constitutional tort and the Kuzmas' burden to show a proximate causal connection between the closing of the motel and the mortgage foreclosure. The instructions employed, nearly verbatim, the language from the Eleventh Circuit's opinion remanding the case for a second trial,[3] and accurately reflected the law on

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3. Guided by common law tort principles of damages and causation, our cases have recognized that § 1983 defendants are responsible for the natural and foreseeable consequences of their actions. For damages to be proximately caused by a constitutional tort, a plaintiff must show that, except for that constitutional

(Cont'd)

the element of causation. *See Malley v. Briggs*, 475 U.S. 335, 344-45 n.7 (1986); *Carey v. Piphus*, 435 U.S. 247, 255-59 (1978). Nothing in the record shows that the jury found the instructions confusing — to the contrary, their answers on the special interrogatory verdict form were consistent and supported by the evidence. Although the outcome of the trial was certainly not what the Kuzmas had hoped for, there is nothing about the jury instructions to suggest that it was unfair.

The Petitioners may be dissatisfied with the way the instructions were phrased, but they have not shown that they are contrary to law or create a conflict with a decision of this Court or any other Court of Appeals. Accordingly, the Petitioners have presented no basis for the Court's review.

(Cont'd)

> tort, such injuries and damages would not have occurred and that such injuries and damages were the reasonably foreseeable consequences of the defendant's tortious acts.

Kuzma v. City of Fort Myers, No. 03-11382 and No. 03-12535, p. 6 (June 7, 2004) (internal citations omitted).

CONCLUSION

For all of the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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